Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1581

PAUL LEEMON, SR.,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

MOTION FOR REHEARING OF ORDER DENYING APPEAL AND IN THE ALTERNATIVE FOR WRIT OF CERTIORARI

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Now comes the Appellant, Paul Leemon, Sr., by his undersigned attorneys, Pree & Pree, Attorneys, Edward G. Pree and Michael W. Hogan, and files his motion for rehearing and reconsideration of this Court's Order dated October 4, 1976, in the above entitled cause, which with caption omitted reads in words and figures as follows:

> "The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied."

and moves the court upon the following grounds:

1. The cause was properly filed, docketed and entered in the proceedings of the United States Supreme Court

and given case number 75-1581. No motion challenging the jurisdiction or other responsive pleadings were filed by the adverse party hereto. Counsel feels this Court has jurisdiction of this appeal under the principles discussed in *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975) and unresolved question of prosecution of multiple crimes arising from a single factual transaction set forth in *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932); *Sealfon v. United States,* 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948).

2. That said cause of action is properly grounded upon the same case law and arguments set forth in the cause of *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), and which case on the issue of merger of inchoate and substantive crimes, and which the opinion in said case does not determine but sustains the position of Appellant as his indictment for conspiracy and burglary DO NOT contemplate the activity of other persons to the substantive offense and no presumption of legislative intent can be drawn from the Illinois provision on conspiracy, as the historical notes to said Illinois Statute reveal that the criminal law committee neglected or refused to comment on said doctrine of merger or that said crimes were to be treated independently. Chapter 38, Section 8-2, Illinois Revised Statutes.

3. That the opinion in *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), discusses the "Wharton Rule" and attempts to define this objection to inconsistent verdicts as a judicial presumption, discretionary in nature, but said rule also arises from the absence of adequate pleadings in criminal causes; the paucity of issue formulation and the prejudicial evidentiary admissions which are indulged under a conspiracy charge; the elimination of differentiation of criminal responsibility of parties

to a crime; admissions for acts of others without specific intent as to the acts or omissions of other parties; evidence relating to the substantive offenses without proper proof of the conspiracy agreement under the doctrine of complicity, and the denial to defendant to argue punishment or submit an instruction that the jury might consider the punishment to be imposed in rendition of its verdict, all of which renders "Wharton's Rule" a recognition of the fundamental right to a logically and legally consistent verdict as part of the Sixth Amendment right to trial by jury. *Iannelli v. United States,* 420 U.S. 616, 791 (opinion seems limited in direct application to Title 18 USC Section 1955).

4. The uniformity principles set forth in *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) and *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 7071 (1969) regarding trial by jury, should insure to Defendant that inchoate offenses which are premised upon certain elements one of which is the commission of an overt act by Defendant and/or his co-conspirators, and a jury verdict which finds directly by joint conviction, or impliedly, by acquittal of one offense and conviction of the other in such a joint indictment, the overt act necessary to give the conspiracy sufficient evidentiary support of intention, produce a verdict which can be logically and legally consistent with guilt on both offenses. In the case of Defendant, Paul Leemon, Sr., the overt act of driving to the place of the burglary was the common element of both offenses, the "Overt Act" which constituted a part of both charges, and the jury made a finding of guilt on the conspiracy and non-guilt on the burglary. See Jurisdictional Statement pp. 4-10 inclusive.

Under the above cases with reference to a right to trial by jury, the same standard and application of Wharton's

Rule should be required in state courts as in federal courts under the absorption doctrine announced in *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, or Defendant Leemon will be seriously prejudiced in the application of his right to trial by jury and its enforcement under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

5. One of the most telling problems in the confusion of handling the octopus or shotgun approach of the prosecutorial zealot, lies in the ignorance of the jury and the indifference of the judiciary to maintenance of the basic principles announced in Wharton's Rule and the *Iannelli* opinion. The Appellate Courts in Illinois have used the device of setting aside the dual conviction as a means for circumventing the double jeopardy challenge to the multiple count indictment, and the concept of double jeopardy, although ruled upon in *Iannelli,* seems to be worthy of reconsideration in light of the Court's divided opinion in *Iannelli v. United States,* and *In re Jones,* that double jeopardy relates to the exposure to and the hardship of trial, and not simply to the threat or actuality of double punishment. Art. III, Section 2, United States Constitution; Sixth Amendment to United States Constitution; *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932); *Sealfon v. United States,* 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1945); *George v. Illinois,* 167 Ill. 447, 47 N.E. 741 (1897).

The Illinois Court seems to explain the independent motivation test to sustain conviction for multiple crimes arising from the same circumstantial transaction, apparently on the grounds that intent or motivation is a separable element in multiple crimes and no reversal of multiple verdicts and sentences is necessary. See *People v. Morgan,* — Ill.App.3d —, 350 N.E.2d 27, 35-36 (1976).

This concept of remedial election by the appellate court after trial and conviction and sentencing hardly seems justified if double jeopardy is going to be something more than a meaningless ritual to clear up the prosecution's inability to prove its case without the license to charge an accused with multiple offenses regardless of the prejudicial effect of forced joinder and trial.

The "intent" situation when it amounts to the same intent for multiple crimes arising from the same factual transaction is discussed in *People v. Roop,* — Ill.App.3d —, 350 N.E.2d 236, 239, and Defendant Leemon should be discharged on the basis of the "most serious crime" rule by virtue of his acquittal on the burglary charge.

The analogous inconsistency of a single intent found in one crime but not found in another, when both offenses are part of the same transaction is discussed in *People v. Viser,* — Ill.App.3d —, 343 N.E.2d 903, 911 (1976).

The final difficulty in fundamental fairness and substantial justice lies in the language which allows the court to find legally and logically inconsistent verdicts within the province of jury deliberations as to lenity, and which prohibits the Defendant from arguing punishment or submitting an instruction as to such a finding of lenity to the jury. If lenity is a proper issue for jury consideration, then Defendant should be entitled to an instruction in the absence of issue formulation at some stage prior to trial. The Illinois Supreme Court appoints the committee to draft the approved instructions, and then penalizes the accused by failure of his counsel to ask for the proper instructions of the trial court, and fails to require the court to give the proper instructions to protect the defendant from prejudice. Defense can hardly overcome such a loaded deck consideration. See *People v. De Boise,* — Ill.App.3d —, 341 N.E.2d 483, 487.

WHEREFORE, the Defendant, Paul Leemon, Sr., prays this Court for reconsideration and rehearing of the Order dated October 4th, 1976, denying said appeal and in the alternative, denying certiorari, and moves the Court to reinstate said cause for determination on the merits, and for a stay of the Court's mandate in said cause until said rehearing can be held, and for such other and further relief in the premises as to the Court shall seem just and proper.

Respectfully submitted,

PREE & PREE, Attorneys
EDWARD G. PREE and
MICHAEL W. HOGAN

by _____
Attorneys For Appellant

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NO. 75-1581

STATE OF ILLINOIS }
COUNTY OF SANGAMON }

AFFIDAVIT OF COUNSEL

Now on this 25th day of October, 1976, comes MICHAEL W. HOGAN, one of the attorneys for the Defendant, PAUL LEEMON, SR., and being of lawful age and first duly sworn states upon his oath that said Motion for Rehearing is not made for the purposes of delay, but upon a good faith, earnest and sincere belief that said cause should be reevaluated in the light of the Wharton Rule as announced in the case of Iannelli vs. United States, 420 U.S. 770, 43 L.Ed. 2d 616, 95 S.Ct. 1284 (1975), and the other grounds advanced by counsel, and finally by reason of the divided opinions in the Iannelli opinion and the charge in judicial personnel which time has occasioned even since the rendition of that opinion.

/s/ Michael W. Hogan

Subscribed and sworn to before me, a Notary Public, within and for the County and State aforesaid, this 25th day of October, 1976.

/s/ Vickie L. Stamper
Notary Public

My commission expires:
June 18, 1980